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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

vs.

ANDREW L. BETTWY, as State Land Commissioner, and the STATE LAND DEPARTMENT, A Department of the State of Arizona, and PIMA MINING COMPANY, a corporation,

Appellees.

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

vs.

THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., THE ANACONDA COMPANY, as partners in and constituting ANAMAX MINING COMPANY, a partnership,

Appellees.

CITY OF TUCSON, a municipal corporation,

Appellant,

vs.

ANAMAX MINING COMPANY, and DUVAL CORPORATION, and DUVAL SIERRITA CORPORATION,

Appellees.

NO. 11439-2

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING

GIMPS NOW, the CITY OF TUCSON, and through its counsel submits this Memorandum in Support of its Motion for Rehearing.

DATED this 10th day of October, 1976.

JAMES D. [illegible]
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City of Tucson

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I.

GENERAL CONSIDERATIONS

As indicated in the pleadings, briefs and other documents before the Court in this action, the City of Tucson's water utility serves the exclusive water needs of well over 300,000 people in Southern Arizona. All indications are that economic and population growth within the service area of the water utility will continue. The operation of a water utility of that size is capital intensive, and due to that fact it is an absolute necessity that the City engage in long term financing which requires long term commitments for the repayment of its obligations. In such circumstances, it is imperative that a substantial degree of certainty exists as to the viability and availability of water resources in the greater metropolitan area. The rules of law announced by this Court have made it impossible to predict with any degree of certainty what rights the City may permissibly exercise in percolating groundwaters anywhere within the Santa Cruz basin. The Court's decision must be clarified in order to ensure the economic and social viability of this part of the State. The Court's decision should be modified to recognize rules of law which it has previously enunciated, and upon which immense investment by the City and others havebeen based and upon which the economic security of our community and State have come to be based.

In this Memorandum the City will attempt to point out to this Court in what manner the opinion creates this uncertainty and what factors and rules of law the Court failed to consider in the decision.

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II.

THE NATURE OF THE PROPERTY RIGHT IN PERCOLATING GROUNDWATERS

This Court has repeatedly stated that rights in percolating groundwaters have been governed by a rule of private ownership since the declarations in Howard v. Perrin, 8 Ariz. 347, 76 P460 (1904), and accordingly, that these private property rights must be given the judicial protection demended by our Constitution. Bristor v. Cheatham, 75 Ariz. 227, 255 P3d. 173 (1953). An inquiry into the nature and extent of these private rights is essential when discussing the degree to which the Court is bound to and capable of affording protection for these rights.

It is commonly stated that in Arizona a landowner "owns" the water underlying his land. Maricopa County Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P2d, 369 (1931), Bristor v. Cheatham, supra, Jarvis v. State Land Department, 104 Ariz. 527, 456 P2d. 385 (1969). This concept is based on the idea that percolating groundwater "is a component part of the earth, having no characteristic of ownership distinct from the land itself. . .", State v. Anway, 87 Ariz. 206 at 208, 349 P2d. 774 (1960). Scientific knowledge and pronouncements of this Court, however, recognize that water, unlike soil and other components of the land, moves according to the law of gravity, whether found on the surface or underground. The rules of man-made law must recognize the higher governance of physical law.

It is a basic tenet of water law, whether founded on riparian, appropriative or other mixed systems of legal concepts, that the unqualified and absolute ownership of any particular source or amount of water in its natural state is not possible. A property right in water is a right in the use of the water and is most generally described as a usufructuary right vested in those

* *

* *

who have exercised the right. See Clark, I Waters & Water Rights §53 (1967).

A concise statement of the nature of this private right is contained in the case of Williams v. City of Wichita, 190 Kan. 317, 374 P2d 578 (1962) which dealt with competing uses of groundwater from aquifers quite similar to those generally found in the basin and range province of central Southern Arizona.

> "(T)he use of the term "ownership as applied to percolating water has never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself. This necessarily follows from the physical characteristics of percolating water. It is migratory in nature and is a part of the land only so long as it is in it. There is a right of use as it passes, but there is no ownership in the absolute sense. It belongs to the overlying owner in a limited sense; that is, he has the unqualified right to capture and control it in the quantity desired and with an immunity from liability to his neighbors for doing so. When it is reduced to his possession and control, it ceases to be percolating water and becomes his personal property. But if it flows or percolates from his land, he loses all right and interest in it the instant it passes beyond the boundaries of his property, and when it enters the land of his neighbor, it belongs to him in the same limited sense..." 374 P2d. at 588.

This statement is consistent with previous declarations of this Court relative to the property interest in percolating groundwaters which is vested in overlying landowners who have put the supply to a beneficial use. Explicit in the idea that the landowner "owns" the groundwater underlying his land is the fact that the landowner has no further property interest in the water once it has moved away from his land to a degree where it is physically inaccessible from his property. This is all the more true in those instances where the water has flowed by gravity away from the lands of an upstream owner to underlie those lands downstream.

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From this analysis it is clear that the property right in underlying groundwater in Arizona is not one that can exist in an inchoate condition but only arises once a person has taken the necessary steps to capture the flow as it passes beneath his property, and thereby reduces it to personal possession and applies it to a beneficial use. This property right, as it has evolved in Arizona, does not vest in any landowner a right to a given groundwater level under his land at any given time and indeed this Court has sanctioned the "mining" of groundwater as evidence that this property right is common to all those having lawful access to the resource. State v. Anway, supra, Farmers Investment Co. v. Pima Mining Co., 111 Ariz. 56, 523 P2d 487 (1974).

That a landowner's "property right" is subject to total defeasance by other owners overlying the resource is manifest in this Court's adoption of the reasonable use doctrine in Bristor v. Cheatham, supra. The very essence of the reasonable use doctrine, as previously stated and understood in Arizona, is that no landowner has an absolute right as against another to any amount or status of the groundwater resource, but rather, that each is subject to infringement upon his supply by other reasonable uses without limit. The reasonable use doctrine, as correctly stated by Chief Justice Cameron, affords no extended protection to any user and truly affords a right which is in many instances quite illusory.

In spite of the limited extent to which the true nature of the reasonable use doctrine protectsusers of groundwater, the majority in this case has enhanced this limited right in certain users and elevated these rights to a stature never before attainable under any application of the reasonable use doctrine, or any other doctrine of private property applicable to percolating groundwaters. This result is reached through the majority's assumption that damage may be presumed in any complainant using

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groundwater from a basin that is admittedly being depleted, in a gross sense, at a faster rate than it is replenished, and that this damage is effected on the complainant by every other user of groundwater from the basin. This holding completely ignores the factual issues explicit in any settlement of disputes under the reasonable use doctrine and the very nature of the property right sought to be protected under that doctrine. To make these assumptions in a factual void is inequitable to all the litigants and casts unnecessary burdens and culpability on the City of Tucson in a case where the facts, if adduced, would very likely show the City to be the least offending of the competing parties.

This Court has in many instances, and again in this decision, emphatically stated that property rights acquired and exercised in good faith, based on the Court's prior decisions, deserve protection. The City of Tucson submits that the majority opinion in this case does not protect these property rights acquired and exercised in good faith. Rather, it subjects the rights of every party to this litigation to derogation and defeat by any potential plaintiff, including the government of the United States, with counsel alert enough to allege that water is being used in the Santa Cruz Basin, or the Salt River Valley, off the premises from which it is withdrawn.

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III.

THE REASONABLE USE DOCTRINE

The reasonable use doctrine as adopted by this Court in previous decisions is composed of two basic concepts. The first relates to a standard of use "on the land" and the second refers to a requirement that damage be sustained by one complaining of a use assertedly made "off the land" in violation of the first requirement. The opinion of the majority in this case shrouds these two concepts in uncertainty and makes a rational application of the doctrine gravely difficult for water users and their counsel within Arizona. A discussion of the two concepts outlined above and the majority's assumptions regarding them will point up the uncertainties perceived by the City of Tucson.

A. On the Land

A classic statement of the reasonable use doctrine as applied to percolating groundwaters is found in the case of Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A2d 87, 90, as quoted on rehearing in Bristor v. Cheatham, supra.

> "While there is some difference of opinion as to what should be regarded as a reasonable use of subterranean waters, the modern decisions are fairly harmonious in holding that a property owner may not concentrate such waters and convey them off his land if the springs or wells of another landowner are thereby damaged or impaired . . ." 75 Ariz. at 236 (Emphasis supplied).

It is obvious from this statement that what is and is not "off his land" is a basic inquiry in the application of the rule.

In the second Bristor opinion, supra, the Court at 75 Ariz. 235 refers to the allegation of count one of the complaint that the defendants were transporting the water allegedly pumped from beneath the lands of the plaintiffs a distance of three miles to irrigate lands theretofore not irrigated. It must be

stressed that in this regard the Bristor Court did not hold that Cheatham and the other defendants' uses were unreasonable under the rule and thus enjoinable, but only that count one of Bristor's complaint stated a cause of action sufficient to defeat a motion to dismiss and that any determination of whether this alleged transportation violated the rule would be left for the determination of the trial court. With that in mind it is clear that the Bristor case on rehearing gives us no indication of what "off the land" meant. It is interesting to note, however, that at the time of the decisions in Bristor v. Cheatham all the lands there considered had previously been included in the Salt River Critical Groundwater Area pursuant to the Groundwater Code of 1948. Even so, the Court did not feel compelled to dispose of the case on such a sparse record but remanded it for trial.

Lacking any definitive measure of what "off the land" meant in the context of the rule announced in Bristor v. Cheatham, supra, we must turn to the first case that dealt with that issue directly.

The case of State v. Anway, supra, arose in the Avra Valley to the west of Tucson. At its inception all lands there involved had been included in the Marana Critical Groundwater Area for over 5 years. The Anway case dealt with an interpretation of the Groundwater Code but also directly addressed the issue of where water could be used. The opinion at 87 Ariz. 208 specifically states that the Anways were "effecting a crop rotation from one parcel to another." (Emphasis supplied). There is nothing in the opinion to indicate over what distances the water was transported, indeed no trial on the merits was ever had in the case, but this Court specifically sanctioned this transportation from parcel to parcel

The next decision of this Court relative to the meaning of "off the land" again arose in the Avra Valley in Jarvis v. State

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Land Department, 104 Ariz. 527, 456 P2d 385 (1969). In that case the Court enjoined the taking of groundwaters from the Avra Valley to the adjacent Santa Cruz Valley and utilized the Critical Groundwater Area designation as conclusive evidence of damage to the petitioners. From Jarvis I, then, it is clear that taking water from one hydrologic basin to another is transporting it off the land and since damage was assumed the rule of reasonable use was violated.

The concept of "off the land" was again addressed in Jarvis v. State Land Department, 106 Ariz. 506, 479 P2d 169 (1970) (Jarvis II). At this point it was clear that Tucson's transportation of groundwater across distinct and real hydrologic boundaries was violative of the rule if damage be assumed. After restating the applicable law, the Court analyzed the water deliveries being made by Tucson as alleged by petitioners to be both within or without the Marana Critical Groundwater Area.

In addressing the question of whether Tucson's deliveries to Ryan Field were within the rule, this Court again used the boundaries of the critical area as an evidentiary presumption that since Ryan Field was within the critical area it overlay the common supply and that Tucson had a valid, legal right to withdraw water therefrom for use at the Field. At 479 P2d 173 the Court described the Ryan Field situation in the following words:

> "Tucson questions whether on equitable principles it should be prohibited from delivering water to Ryan Field. Ryan Field is an airfield which we understand has existed at least as long as petitioners have engaged in agriculture. Its lands overlie the Avra-Altar water basin and geographically it lies within the Marana Critical Ground Water Area so as to entitle it to withdraw water from the common supply for all purposes except agriculture. Tucson should not be prohibited from delivering water to Ryan Field for lawful purposes since the Ryan Field supply is from the common basin over which it lies and from which it could legally

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> withdraw water by sinking its own wells for domestic purposes."

In response to petitioner's inquiry concerning water deliveries by Tucson to services within the Avra Valley drainage area but not within the critical area, this Court declined to employ the evidentiary presumption attendant to the critical area boundaries and thrust the burden on the City to show that these serviced properties overlay the water basin from which the City withdrew the water. In the event the City could show this, the equitable sanctions would be modified accordingly. This Court stated these facts and the City's burden in the following words:

> "Tucson's delivery of water to purchasers within the Avra-Altar drainage area outside the Marana Critical Ground Water Area is, however, without equitable sanction. There is no indication in the record that these customers of Tucson overlie the water basin so as to come within the principle applicable to Ryan Field. Until Tucson can establish that its customers outside the Marana Critical Ground Water Area but within the Avra-Altar Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued."

Based on these three Arizona cases the permissible limits within which percolating groundwaters may be transported and not violate the reasonable use doctrine's prohibition of using waters off the land may be stated as follows:

(1) Groundwater may be pumped and transported for use on land which demonstrably overlies the common basin supply, [a] where there is a legal right to withdraw water from the lands so served.

(2) If the lands from which the water is withdrawn and those upon which it is used are both within a critical area then an evidentiary presumption will

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arise to sanction the use,

When this principle is applied to Tucson's withdrawals and uses in the instant case, it is clear that Tuscon cannot be said to be violating the first part of the reasonable use doctrine as a matter of law and the issuance of a partial summary judgment, and the affirmance of that judgment by this Court is unjustified and unprecedented under Arizona law.

All uses of the groundwaters withdrawn from the Tucson wells subject of that judgment are made on lands overlying the common Santa Cruz Basin, in areas where the existing landowners or the City itself could drill wells and obtain equal quantities of groundwater. To manage the water utility's withdrawals in the latter manner would, however, imbalance and accelerate local withdrawals and surface subsidence. The declarations of this Court in Jarvis II gave the City additional assurance that its withdrawals in the Santa Cruz Basin regardless of precise location were made under full legal authority. If the majority opinion is not modified, the City will suffer loss of capital assets and of water producing capability established in good faith on this Court's former declarations.

B. Damage

The second conceptual phase of the Arizona doctrine of reasonable use is that of damage.

This aspect of the rule requires that if transportation of groundwater off the land is found then the rule is violated only if the plaintiff can additionally demonstrate damage or impairment of his own lawful right. This facet of the rule is the one to which this Court does the greatest violence in the majority opinion. The majority opinion equates an acknowledgement by the City of Tucson that in a gross hydrologic sense more water is being withdrawn from the Santa Cruz Basin that is recharged annually to that supply, as an admission that the City is

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damaging the other litigants in this case and, in particular, the Duval defendants. This assumption is made on a record devoid of supporting facts and is based on a similar assumption made by this Court in Jarvis I, supra.

In Jarvis I this Court employed the statutory definition of a Critical Groundwater Area in making a factual determination that the petitioners in the case would sustain irreparable damage if the City's plans were realized. The City vigorously objected to the utilization of the irrebuttable presumption of damage by the Court and in view of subsequent developments, again strenuoulsy urges this Court to abandon such an inequitable and imprecise presumption concerning relative property rights and return to a standard wherein aggrieved persons are afforded the opportunity to prove and to be compensated for damage to their individual interests.

The effective assumption by this Court in Jarvis I was that the groundwater underlying the Avra-Altar Valleys constituted a lake or body of water as it may exist on the surface and that this water reacts to withdrawals in a manner analogous to a surface water body. In other words, the Court assumed that a withdrawal from one location in the Valley uniformly affected the water underlying the entire Valley to the same degree. This is clearly a fiction created by this Court to absolve the petitioners in that case of the burden of demonstrating irreparable damage to their lawful rights arising from the City's actions.

A result of this view of physical relationships and realities can be seen in what could conceivably occur when the City exercises its rights under Jarvis II. Under that exception to the reasonable use doctrine the City may buy farms in the Marana Critical Groundwater Area, retire the farms from agriculture and pump the allowable quantities formerly used on the farms from its wellfield in another part of the Valley. If the City's

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wellfield were located near a still productive farm it is unlikely that the retirement of a farm miles away will ameliorate any water declines being experienced by this adjacent farmer but it is conceivable that the withdrawals from the City wellfield could affect this farmer within a shorter time frame than would have resulted had the City not retired farms nor pumped its wellfield. In short, the bathtub approach employed in Jarvis I, Jarvis II, and in the majority opinion falls far short of addressing the true relations of groundwater users in space or time.

If it be assumed, however, that the damage presumptions in Jarvis I were well founded and valid, that is not to say the same rationale is equally applicable in this case. There are substantial differences between this case and the Jarvis circumstances.

First, in Jarvis the transportation of groundwater was from one hydrologically distinct basin to another. In this case all of the withdrawals by the City are made from the same hydrologic basin as the one where the water is transported and used. That is, the Santa Cruz Basin.

Second, in the Jarvis case the withdrawals by the City were proposed to be upgradient from substantially all the cultivated lands of petitioners while in this case the City's withdrawals are admittedly all downgradient from the points of withdrawal and use of all the other parties litigant.

Third, the Jarvis action was initiated as a class action on behalf of all owners of cultivated lands in the Avra-Altar Valleys and, accordingly, to assume that damage would result to one or some of the interests represented by the petitioners is less speculative than in this case, where the City is enjoined at the request of one single party. Here the assumption cannot be that the City's withdrawals are damaging "overlying landowners" in some aggregate sense but the finding must be that the City is

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damaging the Duval defendants specifically. This is a much more tenuous presumption by this Court than was required in Jarvis I, and for these differences the City should be relieved of the equitable sanctions herein affirmed until such time as some party litigant can demonstrate irreparable damage to his lawful interests occassioned by water uses of the City demonstratably made off the lands from where the water is withdrawn.

In addition to the reasons stated above why the broad assumption employed in Jarvis I should not be extended to this case, there is abundant reason given in the majority opinion why the injunctive sanctions imposed against the City should be vacated and the case returned for trial on the merits.

The majority, at page 13 of the Anamax appeal, enunciates a basic principle of hydrology in these words:

> "If we assume that the water withdrawn from a underground pool which is not consumptively used returns to replenish the common source of supply, still where groundwater percolates through the soil downgradient, the replenishment of the supply does not benefit the users of water upgradient from the point of return."

In the Tucson appeal the majority correctly states the factual relationships of the parties, stating that all of the City's wells subject to this litigation are "located in the valley of the Santa Cruz River and within its watershed downstream from lands owned by FICO and the mining companies and downstream from the points at which FICO and the mining companies can return water to the underground water supply." From these two factual statements, one concerning a basic axiom of hydrology, and the other the spatial relationship of the parties litigant, it is unequivocably clear that the water pumped from the wells of the City of Tucson is unavailable now, has been unavailable for conceivably thousands of years, and will never in the future be available for any withdrawal and use by any of the parties

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litigant other than the City of Tucson. Based on these facts, which the Court embraces, the City of Tucson submits that it is a hydrologic impossibility that the withdrawals of the City of Tucson can at any time in the past, present or future impair any of the rights of the other parties litigant.

This Court may take judicial notice that the City of Tucson is physically located to the north and downgradient from its wells, the subject of this litigation, and consistent with the Court's factual declarations that groundwaters in the Santa Cruz Valley move from south to north, it is apparent that the only conceivable damage by Tucson's wells to any party to this litigation is to the City of Tucson itself. Stated another way, from a hydrologic point of view the water pumped by the City of Tucson in the area now in question would have continued its flow northward eventually to underlie the City itself and in this way meet the test as enunciated in Jarvis II and discussed above. The actions of the City enjoined in this case are merely those wherein the City of Tucson intercepts groundwaters which would have otherwise percolated north to the City, in which case the City would have an unquestionable legal right to pump and use these waters under any interpretation or application of the reasonable use doctrine. To prevent the City from effecting rational management goals of reducing withdrawals from beneath the City proper, to the greatest extent possible, is an unjustified and unnecessary exercise of judicial power.

That a complainant must still demonstrate damage to his lawful interests in order to impose the sanctions of the reasonable use doctrine has been most recently reaffirmed by this Court in the case of Neal v. Hunt, 112 Ariz. 307, 541 P2d 559 (1975). In that case it was acknowledged that "[t]he defendants want to mine the water and transport it off the land . . ." at 562. (Emphasis supplied). Even though the lands there considered do

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not lie within the confines of a critical area the use of the term "mine" in two places in the opinion would indicate that an overdraft situation existed in Truxton Canyon just as all parties to this litigation admit that in a gross sense this condition exists in the Santa Cruz Basin. In light of the majority's assertion at page 21 of the opinion this case "is not predicated on the pumping of water from a critical groundwater area as were the two cases of Jarvis v. State Land Department." The City of Tucson completely fails to see the distinction between these two cases wherein both the mining of groundwater is taking place, but where in one the trial court examined the factual basis of damage claimed, while in the other the plaintiff's case was made out for him through a broad assumption that damage is to be found as a matter of law. These two cases cannot be logically reconciled since in both it is admitted that the groundwater is being "mined"; in both considerations relative to critical groundwater areas are deemed irrelevant, but in one the plaintiff is on his proof, while in the other the Court assumes away this difficult and substantial burden.

The fact is that in all areas of substantial economic activity in Arizona the mining of groundwater began decades ago and continues through today. If this Court's assumption concerning the Santa Cruz Basin prevails, a water litigant in any of the important groundwater basins in the State will never have to show the individual relationship between his uses and those of which he complains. His only burden will be to establish through his pleadings that his use is from the same basin as that of the defendant; that withdrawals from the basin exceed replenishment of the basin supply in a gross sense; and that the defendant is not using the water so withdrawn on the lands from which they are withdrawn. The only true factual issue left to litigate is whether the water is being used on the lands from which they are

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withdrawn. This issue will require litigation since the majority opinion fails to provide a definitive standard of what this concept is, since if this opinion prevails the standards established in Jarvis II are obviously inapplicable. In any case, if the complainant can convince a court that the use complained of is, under some supportable standard, "off the land" then he will also be entitled to an injunction regardless of the relative value of the use or any other countervailing equity which may be in the defendant.

To subject the City of Tucson to an uncertain future in the provision of a necessity of life to its people is not required by pre-existing Arizona law concerning groundwater nor by the facts and circumstances of this case.

In concluding its discussion of the reasonable use doctrine, the City of Tucson urges this Court to reconsider its affirmance of the equitable sanctions leveled at the City's uses. Under prior Arizona groundwater law, as clearly stated in Jarvis II, the City is not using the waters in question "off the land" and the complaining party, the Duval defendants, have not proved their allegations that Tucson's withdrawals damage their lawful rights in any manner whatsoever.

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IV.

AFFIRMANCE OF THE PARTIAL SUMMARY JUDGMENT

The affirmance by the majority of the partial summary judgment entered by the trial court against Tucson at the request of Duval raises uncertainties concerning what acts of the City are being prohibited and upon what basis these prohibitions are sustained.

The trial court's entry of the partial summary judgment was based solely on its legal conclusion as to the substantive affect of a groundwater subdivision boundary. The majority, in the Anamax opinion, explicitly rejected the trial court's interpretation of the legal affect of the subdivision boundary, but nonetheless affirmed the summary judgment entered against the City based solely on that exact interpretation.

Tucson has strenuously urged this Court to reconsider its decisions because an application of the reasonable use doctrine should require the consideration of many factual questions on a case by case basis. Consistent with that position Tucson now urges this Court that the partial summary judgment should be vacated and the City case returned to the trial court for a determination of those facts through a trial on the merits.

It is respectfully submitted by the City that if the trial court's determinations in this case had been framed in a manner consistent with the majority opinion, Tucson would have addressed the issues in a much different way than was done in the instant case. In this case the issue presented to the trial court in Duval's motion for summary judgment was solely whether or not a boundary of a groundwater subdivision had any legal affect on substantive groundwater rights in Arizona. The only argument urged by the City was that the very procedure of establishing those boundaries and the clear legislative purpose for which they were provided conclusively supported the City's

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contention that a subdivision boundary has no substantive legal affect and was created only as a matter of administrative convenience. The majority opinion supports this position yet no relief is given the City against the equitable sanction entered on this erroneous assumption.

To illustrate the defenseless position into which the City is forced by the majority opinion, let it be assumed that the entire basis for Duval's motion for summary judgment was that of the majority opinion. That is, that the City is violating the reasonable use doctrine because it is using the water off the land from which it was withdrawn and that thereby the lawful rights of Duval were being damaged or impaired.

In this instance, the response of the City would obviously not have consisted of arguing that the subdivision boundary has no affect. On the contrary, Tucson would have raised as evidence the numerous factual questions which it is now forced to raise in argument. Those issues would have included whether or not Duval had proven its damage claim and whether or not the customers serviced by the Tucson wells under consideration were located in areas in which access to the common supply could not be demonstrated.

Moreover, the Court has based its affirmance not on any present interference with lawful uses by Duval. Duval's standing in respect to the City arises from its mere ownership of land within the basin and the prospect that those lands might one day be farmed. Factual questions that must underlie the determination of Duval's lawful use of water on those lands, present or prospective, and the nature and extent of damage to those uses, present or prospective, were not and could not have been addressed by this Court.

Tucson submits that if the case in the trial court had been advanced on the principles enunciated by the majority

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here, no summary judgment would have issued for the Duval defendants. As it stands, any landowner, whether or not he is using water, may prohibit any use by others "off the land" without further factual determinations. The reasonable use doctrine is transformed from a rule governing choate usufructuary rights to a chose in action arising from any land ownership in an overdrafted basin, exercisable at will. As it stands, it is impossible to see how the trial court could have found that the requirements of Rule 56 had been met.

The entry of a summary judgment under that rule is justified only in those instances where there is an affirmative showing by the moving party "that there is no genuine issue as to any material fact" and "that the moving party is entitled to a judgment as a matter of law". Ariz. RCP Rule 56. This Court has most recently upheld this standard, stating "that summary judgment is not proper when there is the slightest doubt as to the facts'". Gibbons v. Globe Development, ___ Ariz. ____, ____ P2d ____ (August 6, 1976) quoting City of Phoenix v. Space Data Corporation, 111 Ariz. 528, 534 P2d 428 (1975).

The decision on rehearing in Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Company, 39 Ariz. 367, 7 P2d 254 (1932) is apposite. It will be remembered that the Southwest Cotton case dealt with a conflict on the Agua Fria River between one asserting prior appropriative rights in a "definite underground channel" and a subsequent user of the surface flow of the river. The trial court declared the rights of the plaintiff based on its definition of what a definite underground channel was. On appeal this Court in an exhaustive and well written opinion by Justice Lockwood set forth specific standards to be applied in determining what constitutes a definite underground channel. On rehearing the Appellees sought to have their

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rights, which met the Court's test, confirmed as prior appropriative rights. The Court declined to do so and at 39 Arizona 369 stated:

> "We are of the opinion that since we laid down a theory of the right of appropriation of water drawn from wells entirely different from that on which the trial court based its findings, it is but fair that both parties should have the opportunity of presenting evidence on this point based upon the proper theory of the law."

In this case we are faced with precisely the same circumstance. The trial court based its findings on a completely erroneous assumption of the substantive effect of a groundwater subdivision. Had it not been for the Court's interpretation of the effect of a groundwater subdivision there would have been no basis in the record for the entry of a partial summary judgment. It is but fair that both parties should have the opportunity of presenting evidence on this point based upon the proper theory of law.

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CONCLUSION

The Court's opinion has effectively concluded as follows:

(1) That in any basin where a state of overdraft exists, any transportation of water off the land from which it is withdrawn may be prohibited.

(2) That the prohibitive action may be maintained by any landowner in the basin, without regard to that landowner's present use of water, and without a determination of his right prospectively to use it.

(3) That in those circumstances, no inquiry need be made into the hydrologic or other physical relationship of the landowner's premises and uses to the allegedly offending activity.

(4) and that the Court will not further examine the effect on economic and social relations of the prohibition.

It is the nature of domestic water utilities that water is not used on the land from which it is withdrawn. There is no limitation in Arizona on the right of a landowner to sink a domestic or industrial well and use the water withdrawn from the aquifer on the superadjacent premises. Except as limited by the Groundwater Code, the same is true of agricultural wells.

If the rule in this case is to be generally applied, a householder in Amado or a farmer at Red Rock will do as well for a plaintiff as the Duval company, for it has not had to demonstrate any actual diminution in the extent or value of its uses or prospects. Their case is as clear as is Duval's on this record. No potential plaintiff need be halted by the fact that he is not actually being damaged.

The Court has stated that it will not prefer one economic interest over another on an ad hoc basis where there are not

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enough of the material goods of existence to go around. It is submitted that the Court has done just that.

The doctrine enunciated on rehearing in Bristor v. Cheatham creates a substantial, imbedded preference for economic uses of water that occur "on the land" over those that necessarily involve transportation off premises. If the Court maintains its present view, that preference may be exercised by showing only that "there are not enough of the material goods of life to go around," and that the transportation occurred.

In no other jurisdiction has the property right been so reinforced by evidentiary conclusions. In no other jurisdiction has the property right inferred from the doctrine been so nearly exalted to bare prerogative. No other jurisdiction in the arid West adopts a doctrine permitting unfettered development of scarce groundwater for uses on the land, and permitting an irrebuttable presumption that other uses are invalid.

The City of Tucson herewith asserts that the time has come for this honorable Court to review entirely those doctrines it has developed regulating the use of groundwater; to see what effect those doctrines have had on valid property rights of all the public. The basis of any system of regulations should be that set forth in Bristor v. Cheatham, ".... to promote the greatest beneficial use by each with a minimum of harm to others."

It is submitted that that standard is not being now met. It is submitted that present development of the reasonable use doctrine works little benefit to narrowly protected interests and great harm to others.

If the Court will not address the issues that arise from the doctrines it has developed, and would leave those tasks to the legislative authority, then let us be heard on the specifically judicial concern of proof. The interests foreclosed by the majority's opinion should be entitled to a factual determination

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of the extent to which they invade interests protected by the doctrine of reasonable use. Fact is the heart of the doctrine. An opportunity to adduce the related facts, on a proper record, is the only protection that water users in Tucson have. That opportunity should not be denied.

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COUNTY OF MARICOPA)

I **Antonio Bucci** hereby certify:
Name

That I am **Reference Librarian, Law & Research Library Division** of the Arizona State
Title/Division

Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Arizona Supreme Court, Civil Cases on microfilm, Film #36.1.764, Case #11439-2, Supplemental Memorandum in Support of Motion for Rehearing, pages 516-541 (26 pages)

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

Antonio Bucci
Signature

Subscribed and sworn to before me this 12/15/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009